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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1949.

No. 472

BETTY STODDARD HORN, BARBARA STODDARD KIRKLAND, LOUIS E. STODDARD, Jr.; and ETHEL S. GARRETT and THE UNION TRUST COMPANY OF PITTSBURGH, as Co-executors and Co-Trustees under the Last Will and Testament of Harry Darlington, Jr., Deceased,

Appellants,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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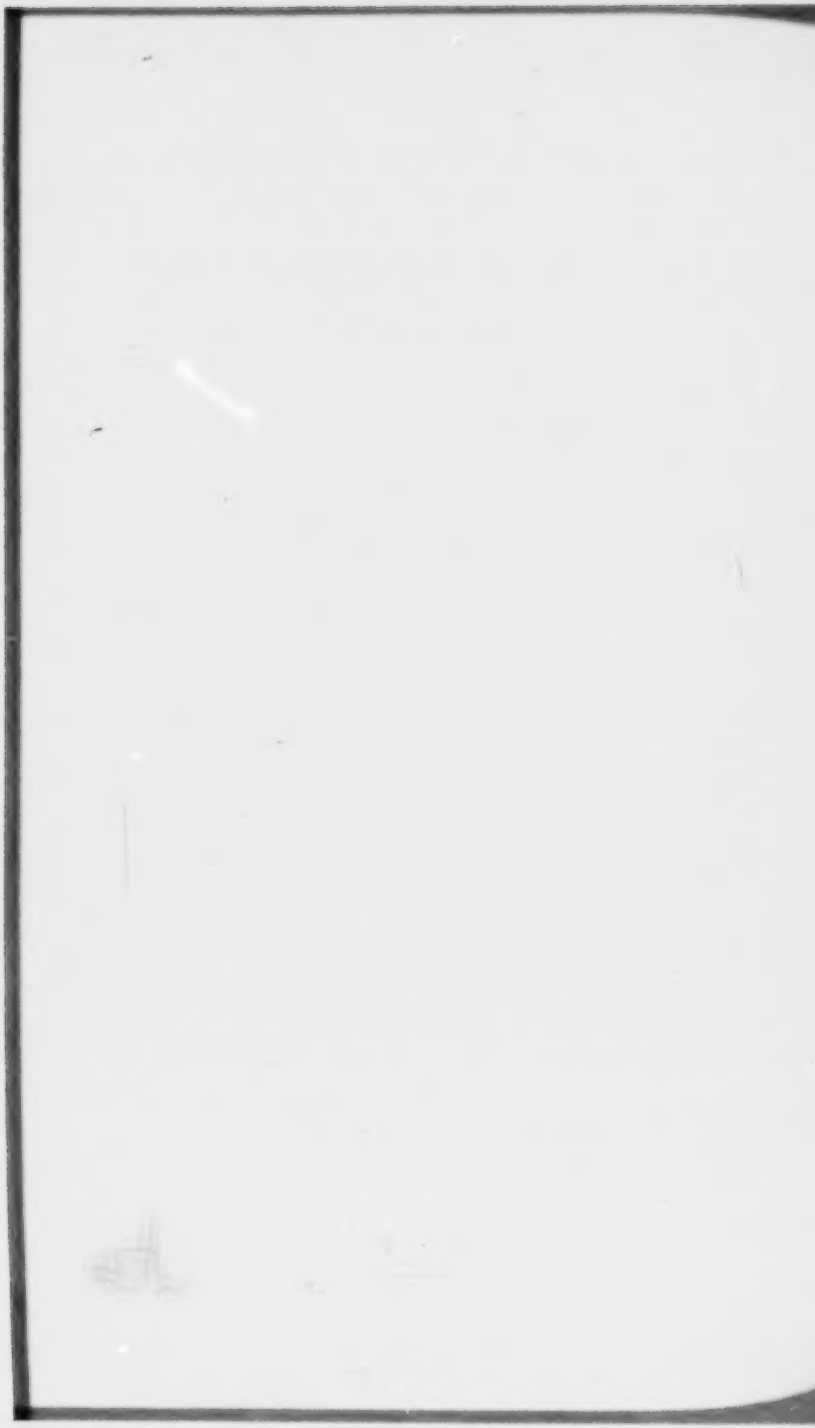

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Appellee's argument is divided into four points, to-wit:

I That the appeal to the United States Supreme Court is not the proper procedure.

II That no substantial federal question is presented.

III That in *non-taking cases*, remitting a property owner to an action at law for consequential damages, does not violate the due process clause.

IV That in non-taking cases, a five year statute is not so burdensome or unreasonable as to violate the due process clause.

The following is a brief summary of appellant's answers to these points, which will be elaborated upon more fully in the detailed argument:

As to Point I: An appeal is proper under Section 1257 (2) of the Judicial Code because the validity of the Illinois Statute of Limitations, as construed by the state supreme court in the instant case, is drawn into question, but if it is not, this court may entertain the petition for appeal as a petition for writ of certiorari.

As to Point II: That no substantial federal question is presented; this argument is predicated chiefly, if not entirely, upon appellee's contention that there was no taking. Appellants contend to the contrary. The construction and definition of "property" and "taking" are of the greatest importance and are vitally substantial.

As to Point III: This argument is applicable solely to non-taking cases and is therefore surplusage and not involved in the instant case, because if the instant case is found to be one of non-taking, appellants concede that no federal question under the 14th Amendment is involved, because that prevents only the "taking" of property without due process of law.

As to Point IV: This also covers solely non-taking cases and is likewise, for the same reasons, not involved in the instant case.

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The Facts of the Instant Case Clearly Constitute The Taking Of Property.

Appellee's whole brief and argument is predicated upon its contention and assumption that there was no taking of property by it under the facts and circumstances of the instant case. It has repeatedly stated and frequently urged that contention. No place has it disputed appellant's statement and argument, namely: that if there was a taking, then the application of the Illinois five year Statute of Limitations would violate the due process clause of the 14th Amendment. Thus the sole question is boiled down to the determination of whether the facts in the instant case constituted a taking of appellants' property within the provisions of the federal constitution. This necessarily involves the definition of the words "property" and "taking", as used in the said 14th Amendment, which is one of the most salient provisions of the federal constitution, and the final determination of the construction and definition of the terms is of the utmost importance and of vital interest to one hundred and fifty million citizens. Appellee has apparently overlooked the fundamentals of what constitutes property and a taking thereof. It also appears to have overlooked the following facts and their serious nature and effect, to-wit:

(1) That appellants owned the fee to the middle of the two adjacent streets and that the easement of the city was only for surface and ordinary travel.

(2) That the sinking of supports for the concrete walls and superstructures through appellants' sub-soil, possibly to bed rock (but the depth is immaterial), and destroying plaintiffs' sub-sidewalk space, constituted a physical invasion of property, if physical invasion is required to constitute a taking.

(3) Similarly, constructing a concrete abutment and superstructure high above the normal street level constituted a physical invasion of appellants' property, namely: of its air, light and view above the street level, and constituted an invasion of its easements.

There Was, If It Is Necessary To Constitute a Taking, a Physical Invasion Of Tangible Property.

Appellants again urge that if physical invasion was necessary to constitute a "taking," then there was such a physical invasion, but under all standards and definitions, no such actual physical invasion of tangible property is required. If Illinois courts hold, that action of the city, as in the instant case, does not constitute a taking, or that such "improvement" is a mere *additional* servitude in the street for street purposes, it violates the 14th Amendment to the U. S. Constitution.

It is the Illinois and universal law that where the adjacent property owner owns the fee to the middle of the street, the city acquires only an easement for ordinary travel.

In one of the early and leading cases laying down the rule, namely *I. B. & W. Ry.* v. *Hartly*, 67 Ill. 439, the Court said, p. 444,

> "Where the fee remains in the original proprietor * * * it is only for the use of ordinary travel, such as we are accustomed to see on streets and highways **"

This has never been changed nor modified. Supporting this principle are *Aldis* v. *Union Elevated*, 203 Ill. 567, 574; *Field* v. *Barling*, 149 Ill. 556; *Allen* v. *Chicago*, 176 Ill. 113; *Greenlee* v. *Boren*, 379 Ill. 494.

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Ordinary travel means at street level and not sub-surface level, or anything which requires the sinking of caissons to bed rock, nor does it contemplate solid concrete abutments with superstructures at the lot line. This is no "ordinary travel".

To illustrate that the city's action here actually constituted an invasion and a taking of property, let us assume that valuable gold deposits or oil mineral rights existed in appellants' property under the street. Would the appellee contend that the excavation and removal of such valuable deposits, to make room for large caissons or supports, would not constitute a taking, and would they urge that if such caissons were so close together that the property owner could not have access to the rest of his valuable minerals in his soil, under the street, that it would not constitute a taking? It is obvious that such action constitutes a physical invasion and a taking of property and that such use is not for ordinary street travel. Cases which overlook the property owner's rights in sub-soil and in the air, and which conclude that actions such as the city took in the instant case do not constitute a taking, clearly violate the Fourteenth Amendment to the United States Constitution. Sub-sidewalk space, commonly used in large cities, also is property, where the owner owns the fee in the street, and is so recognized in Illinois. (*Davis* v. *Chicago*, 333 Ill. 422, 427).

Detailed Answer to Appellee's Specific Points.

I.

Under this point, appellee urges that an appeal is improper. Appellants point out that from the first pleading continually to the Petition for Rehearing, they persisted in the contention that the application of Section 15 of the

Illinois Statute of Limitations violated the federal Fourteenth Amendment because there was a taking. The trial court in its judgment order found (Rec. 4; p. 11), that the application of the statute did not violate the federal constitution. Thus the foundation for appeal, rather than certiorari, is clearly presented by the record. The validity of Section 15 of the Illinois Statute of Limitations as construed and applied in the instant case is questioned as violating the Fourteenth Amendment. Appellants urge that such contentions clearly bring them within Section 1257 (2) of the Federal Code so as to authorize an appeal.

Even though we assume that the validity of the statute is not involved, to bring this case within Section 1257(2) of the Judicial Code, nevertheless, under the present liberalized procedure, this court may regard it as a petition for a writ of certiorari, which appellants pray for in the alternative.

II.

Under this point, appellee urges that apart from the mode of review sought, the appeal should be dismissed or the judgment affirmed because no substantial federal question is presented.

As previously pointed out, appellee's whole argument under this point is predicated upon the erroneous assumption that there must be a physical invasion of appellant's tangible property to constitute a taking and that there was no such invasion in the instant case.

Appellants have heretofore urged, first, that there was such a physical invasion and, second, that it is not necessary to constitute a taking.

The Illinois cases cited by the Illinois Supreme Court in the instant case, in support of its statement that there must be a physical invasion of tangible property, and repeated in appellee's brief and argument against jurisdiction, have already been distinguished and explained in appellants' argument in its jurisdictional statement. They were merely denials for petitions for writs of mandamus, which do not, under the principles of the law of mandamus, constitute a finding on the merits. The Supreme Court and the appellee assumed the contrary, namely: that this constituted a finding that there was no taking. If such cases were held to be a finding on the merits, *i. e.*, that there was no taking, in many of them it would have violated the federal due process clause, although that question was not raised.

Under its Point II, appellee has cited and quoted from only one case, namely *Sauer* v. *City of New York*, 206 U. S. 536, and has devoted approximately four pages to that case. Appellants urge that this case clearly supports their contention and is authority for their position and that appellee has misconstrued its applicability.

In that case, the court held that under New York law, the construction of an elevated viaduct, which impaired the plaintiffs' access and interrupted the use of the light and air, *was not compensable under New York law* and did not therefore, violate the United States constitutional due process clause. *In Illinois such damage is compensable.* In that case, however, *the plaintiff did not own the fee to the land to the center of the street,* as the appellants do in the instant case. This was emphasized by Justice Moody of the United States Supreme Court in his opinion.

The action was brought by the plaintiff in the Supreme Court of New York to enjoin the city from *maintaining the*

viaduct, or in the alternative for damages, the viaduct having already been constructed. There was a judgment for the defendant and the case was taken to the United States Supreme Court on writ of error. That court held that the lower court ruled against plaintiff (p. 542):

> "* * * upon the ground that, under the law of New York, *he had no easements of access, light, or air,* as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist." (Italics ours.)

The Supreme Court quoted from the opinion of the Court of Appeals of New York, in which the New York court held that (p. 542):

> "* * * we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their title subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary * * *."

The Supreme Court then goes on to decide the case upon the simple principle that plaintiff, in that case, *had no property* under the New York law and that there could not be a taking of property which he did not have. Due process, of course, was therefore not involved nor violated. Manifestly, one cannot be deprived of property without due process of law, if the property is not his. The Supreme Court concluded this aspect of the case by saying, p. 548:

> "Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed and that

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therefore there was no property taken, we hold that no violation of the 14th Amendment is shown."

The distinction is obvious. Illinois law recognizes that easements of light, access, etc., are property and that their destruction is compensable.

In Illinois, a Property Owner Retains His Easements of Light, Air and Access in Streets.

The law in Illinois is different than that in New York, in that in New York a property owner has no easements of light and air (at least where the city owns the fee in the street), while in Illinois, the property owner retains these easements, especially where he owns the fee.

In the case of *Field* v. *Barling*, 149 Ill. 556, the court approved the following language in a New Jersey equity case, saying, p. 565:

> "'When the strip of land is declared a public highway, the adjoining owner has the right to light and air from it. * * * When cities and villages have been built up along a public highway, the right to light and air from it becomes vested, and even the legislature would have no more right to deprive them (abutting owners) of it without compensation than they would have to draw out the water from a navigable stream."

In the case of *Aldis* v. *Union Elevated*, 203 Ill. 567, the court says, in its denial for petition for rehearing (p. 574):

> "At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained, as appurtenant to said property, the right of access to said streets, the right to enjoy the air and light which pass over said streets, the view and the comfortable and safe enjoyment of their property."

In the case of *Ferguson Coal* v. *Thompson*, 343 Ill. 20, the court says (p. 28):

> "Owners of property bordering upon a street have, as an incident of their ownership, the right of access by way of the streets which cannot be taken away or materially impaired without compensation."

In the case of *Allen* v. *City of Chicago*, 176 Ill. 113, 121, the court uses the following language:

> "When the fee is taken and maintained as a street by the public authorities the owner's easement of a way is not impaired but still exists, as he has all the right of way before enjoyed."

In *Greenlee Co.* v. *Borin Co.*, 379 Ill. 494, this court stated (p. 498):

> "Where a street has been dedicated by a common law dedication the fee remains in the property owners abutting the street but its use is dedicated to the city in trust for street purposes only."

Under Illinois law, when a munipality acquires a fee in a street, it acquires only the right to the use of the street for ordinary purposes and the owner loses none of his rights therein. The inference in the *Sauer* case is clear, that where a state has defined the rights of its property owners to be that they retain their rights of light, air, view and access, that then the taking of them away would violate the federal constitution.

Thus this case is not authority for appellee's contention, but on the contrary, supports appellants' position. The rest of appellee's argument under this point is predicated upon the assumption that there was not a taking and that a physical invasion of tangible property is necessary. We concede that if there was no taking, then the interposition of the short Statute of Limitations would not violate the Fourteenth Amendment to the federal Constitution,

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which covers only a taking. The balance of appellee's argument is of no value in the determination of the main and sole question here involved, namely: whether there was a taking.

III and IV.

Appellee has devoted six pages to these points, which propound the law as to non-taking cases, consequential damages and the Statute of Limitations. This argument is surplusage and unnecessary, does not aid in the determination of the main question, and is not involved in the instant appeal. No answer will be made thereto.

Conclusion.

In conclusion, appellants urge that the sole question is whether there has been a taking of property under the provisions of the 14th Amendment to the federal constitution. If so, appellants' constitutional rights are conceded by appellee to have been violated. It is highly important that this court, for once and all, settles this question and guide the Illinois courts back into constitutional channels. Appellants call the court's attention to the fact that the statements made under its caption, "This Decision is but part of an Erroneous Trend * * *", has not been disputed and has not been answered.

Appellants urge therefore that this court take this appeal, upon the record here presented, and that it decide the case on its merits.

Respectfully submitted,

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